Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Amendment of the Commission's	)	Docket 95-183
Rules Regarding the 37.0-38.6	)	RM-8553
and 38.6-40.0 GHz Bands	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act --	)	
Competitive Bidding	)	

TO: The Commission

REPLY COMMENTS OF
COLUMBIA MILLIMETER COMMUNICATIONS, L.P.

Columbia Millimeter Communications, L.P. ("Columbia") files these brief reply comments to make three essential points. First, the Commission must immediately move to eliminate or modify the interim processing freeze on pending license applications in the 38.6-40.0 GHz ("39 GHz") band. Second, there is no record support whatsoever for onerous build-out requirements that would discriminate unfairly against existing 39 GHz licensees. Third, there is no reason to delay this proceeding to consider potential future satellite allocations.

From the comments overall, it is apparent that the truly serious contenders to bring new services to the public in the 37.0-38.6 ("37 GHz") and 39 GHz bands (collectively, the "38 GHz band") are those companies that, like Columbia, have expended substantial research and investment capital to develop these bands. The *Notice* drew palpable distinctions in favor of future bidders for 37 GHz spectrum and against the very 39 GHz licensees that have worked hard to make this spectrum commercially usable. But aside from a few personal communications services ("PCS") companies and an association wishing to use 38 GHz spectrum for simple internal backhaul, the only commenters with a serious and current vision for 38 GHz spectrum are current 39 GHz licensees. Given the weight of the comments in the record, we urge the Commission to adopt rules that permit current 39 GHz licensees to build out their systems in response to commercial demands rather than regulatory predictions;

to obtain grants of applications that now are ripe; and to have the same flexibility to design systems that all other licensees in the 38 GHz band will enjoy. Permitting 39 GHz licensees to bring vibrant new services to the public will both create much-needed competition to local exchange carrier ("LEC") monopoly services and will create the demand that will permit 37 GHz licenses to be auctioned successfully.

I. THE COMMISSION'S INVALID AND UNFAIR INTERIM PROCESSING FREEZE SHOULD BE JETTISONED IMMEDIATELY.

It is astonishing that no Commission action has been taken to correct the ill-considered and invalid interim processing freeze even though it has been literally months since an emergency petition to lift that freeze was filed with the Commission. There is uniform support for moderating the freeze and no reasoned support for maintaining it.[1/] In our comments, Columbia urged the Commission to rescind that portion of its order in this proceeding that holds in abeyance all amendments to pending applications for 39 GHz licenses received on or after November 13, 1995, during the pendency of this proceeding. We again urge the Commission to take immediate action by granting the petition for reconsideration and emergency request for stay filed by Commco, L.L.C.

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[1] *See, e.g.*, Comments of the Telecommunications Industry Association at 11-12 ("TIA urges the Commission to lift its application processing freeze on all 39 GHz band applications filed by the December 15, 1996 release date of the *NPRM*"); Comments of Ameritech Corporation at 1 ("Ameritech urges the Commission to immediately resume processing applications . . . that were filed in accordance with the Commission's Rules prior to the November 13, 1995 freeze"); Comments of AT&T Wireless Services, Inc. at 12-13 (recommending that certain parties with non-mutually exclusive applications be permitted "to eliminate the mutually exclusive situations by voluntary agreement"); Comments of GHz Equipment Company, Inc. at 5 ("we strongly urge the Commission to continue processing 39 GHz applications"); Comments of Harris Corporation - Farinon Division at 2 (the "Commission has been most unfair in freezing all 39 GHz applications filed by December 15, 1996"); Comments of Commco, L.L.C.; Comments of Microwave Partners; Comments of Sintra Capital Corporation.

There is simply no reason for the Commission to delay remedying the unwise and patently unfair result of its interim processing freeze. As we pointed out in our comments, there is absolutely no precedent for a *retroactive freeze* that inexplicably and without any reasoned explanation reaches back to an arbitrary date to invalidate applications that are currently ripe for grant. The Commission's action threatens to skew the marketplace over the long term by ensuring that a small number of companies will have a federally mandated period when they will be protected from competition from other 39 GHz licensees. Stopping new competitors like Columbia in their tracks while permitting a few to move ahead constitutes blatant "picking of winners" by a regulatory agency and will stunt the development of a vibrant new industry for years to come.

We urge the Commission to permit all applications that were not mutually exclusive as of the date of the Commission's *Notice* to be processed in the normal course and to resolve this issue immediately.

II. THERE IS NO RECORD SUPPORT OR COGENT RATIONALE FOR SELECTIVELY IMPOSING ONEROUS BUILD-OUT REQUIREMENTS ON CURRENT 39 GHz LICENSEES.

There is no reasoned support in the comments for imposing punitive and discriminatory build-out schedules upon 39 GHz licensees.[2/] The Commission's proposed

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[2] In fact, it appears that the sole justification for imposing burdensome and commercially unreasonable build-out requirements on existing 39 GHz licensees is to force defaults and obtain additional licenses to auction. As several commenters pointed out, it would be impossible as a matter of economics and even manufacturing possibility to effectuate the Commission's proposed build-out schedule. [Cites] Adopting a "spectrum reclamation" policy in the guise of a build-out requirement is not, of course, a legitimate administrative goal.

imposition of punitive build-out requirements on existing 39 GHz licensees that supposedly obtained licenses for "free" misses two essential points:

First, the parties that will have an incentive to "warehouse" spectrum are not the existing licensees but the bidders that may seek 38 GHz licenses in the auction process. Incumbent LECs, for example, would be fully qualified to hold 38 GHz licenses in the areas where wireline services competitive with 38 GHz services are their core business. These entities, which have financial resources that dwarf those of any 39 GHz licensee, would have an incentive to "warehouse" spectrum as a defensive measure. For an incumbent, the "highest and best use" of spectrum in a strict economic sense legitimately could be warehousing it to prevent a new entrant from accessing that spectrum to provide competitive services. Existing 39 GHz licensees, in stark contrast, are entrepreneurial new entrants that seek to provide competition to LEC services. New entrants will have no business if they do not utilize the spectrum they have sought. Build-out requirements are needed, if at all, for auction licensees rather than existing 39 GHz licensees.

Second, Columbia and others did not obtain licenses without substantial cost and effort. If putting significant funds at risk ensures that an entity will, in fact, use the spectrum it has obtained, then that test has been satisfied thoroughly by the efforts of existing 39 GHz licensees. Coordinating and engineering applications to avoid frequency conflicts under the Commission's existing rules requires fastidious, time-consuming and expensive efforts. There is no evidence whatsoever that licensees obtaining licenses through this process would have any incentive to fail to fully utilize that spectrum once it becomes available.

It is clear from the record that the Commission's proposed build-out requirements would be impermissible. It would be impossible as a matter of economics for the proposed requirements to be satisfied, and there is a legitimate question of whether there even is sufficient manufacturing capacity in the United States to supply equipment for such extreme build-out requirements.[3] We believe that no build-out requirements (in addition to existing requirements) need be adopted. But if the Commission must adopt new requirements, it should be guided by its PCS rules and simply require licensees to "make a showing of substantial service in their licensed area" at the time of renewal.[4]

The Commission recognized in adopting this standard for PCS that a "substantial service" test would be sufficient to prevent spectrum warehousing even in the case of PCS spectrum for which LECs and incumbent cellular licensees could bid. The PCS case presents a circumstance in which spectrum warehousing would be more likely than in the 38 GHz band -- with only two open-eligibility 10 MHz blocks available for a bidding universe of three 30 MHz PCS licensees and two cellular licensees, it would be economically rational for any potential bidder to acquire the spectrum simply to prevent its competitor from obtaining

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[3] As one manufacturer analyzed the Commission's proposal:

> Using the build-out rate noted above, over 2,631,000 links would be required during the 18-month period. At the current cost of $10,000 per link, the investment would be over $26 billion. Even assuming volume would bring the cost down to one-fourth that amount, the investment requirement would still be in excess of $6.5 billion. It would not be possible to meet this kind of demand under current technical and market conditions, nor to arrange financing of that degree within the available time frame.

Comments of GHz Equipment Company, Inc. at 4; *accord*, Comments of Milliwave Limited Partnership at 21-23; Comments of DCT Communications, Inc. at 5.

[4] 47 C.F.R. § 24.203(b) (1995).

it. The "substantial service" requirement prevents that warehousing by requiring the spectrum to be used, but does so in a way that does not restrain innovation or prevent the 10 MHz licensee from responding appropriately to market forces.

Such a test would have the same result here. The Commission's "links per market" test would drive 38 GHz licensees to deploy simple point-to-point technologies even in cases where newer, more vibrant point-to-multipoint technologies are planned by the licensee and demanded by the marketplace.[5] This sort of short-sighted build-out requirement would lock in current technology at the expense of more important technologies that are being developed in response to concrete consumer demands; it exemplifies the most inappropriate sort of administrative industrial policy.[6] A "substantial service" standard, in contrast, would require spectrum to be utilized rather than warehoused but would not require licensees to deploy

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[5] As we pointed out in more detail in our comments, Columbia anticipates the development of technology which will allow it to provide point-to-multipoint services that will permit businesses, individuals, public-safety agencies, hospitals and others to obtain immediate on-demand transmission services. These services will permit even greater flexibility and immediacy in transmitting two-way high-volume data, voice, images and video in a manner that now is impossible employing either traditional wired solutions or point-to-point wireless initiatives. Although this technology is not yet ready for market, it is actively being developed today.

[6] It is no response to this argument to state that similar technological advances will characterize other Commission-licensed services that have been subjected to build-out requirements. *No other service has been subjected to a "links per mile" standard that actually requires point-to-point technology at the expense of other, more advanced technologies.* In the case of PCS, Local Multipoint Distribution Service and other services, build-out requirements have been phrased as percentages of population or under "substantial service" criteria. Although a population percentage obviously would be inapplicable here, it certainly does not lock PCS, LMDS or other licensees into existing technologies — licensees can adopt all manner of new technologies under these standards without being locked into point-to-point technologies. A technology-specific "links per mile" standard, in contrast, would limit the future potential of the 37 and 39 GHz services.

technologies that may not be in their business plan merely to satisfy an administrative requirement. If any build-out plan must be adopted, it is clear that only a flexible "substantial service" standard would be appropriate.[7]

Of course, it would make no sense whatsoever to impose any requirement only on existing 39 GHz licensees and not on future 38 GHz licensees that obtain their licenses by competitive bidding. We agree with those commenters that find the potential for such discriminatory treatment to be of questionable legality.[8] But more importantly, discriminating among competitors is simply bad administrative policy. The Commission should not be in a position of "picking winners" by arbitrarily imposing conditions on some licensees that other can avoid merely because it prefers to award licenses by auction. Such a policy would unfairly brand as second-class citizens the very companies that have created the value of 38 GHz spectrum by exploring its uses and aggressively seeking to deploy new businesses based on 39 GHz spectrum.[9] The untoward competitive effects of disadvantaging the pioneers of this band would be felt in the marketplace for years. Accordingly, if any

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[7] Ill-considered plans based on "population density" and other arcane tests would be inordinately complex to administer and bear no rational relationship to the business of 38 GHz wireless service. Unlike PCS and other consumer services, it may be that densely populated residential areas might not be those with the highest demand for certain types of services to be offered by 38 GHz licensees. Under "population density" plans, such areas nonetheless would be subject to the highest possible build-out requirement. Adoption of any such plan would lead to irrational and arbitrary results.

[8] *See* Comments of DCT Communications, Inc. at 15, *citing* 47 U.S.C. § 309(j)(6)(D) (Commission may not "convey any rights" to auction winners "that differ from the rights that apply to other licenses within the same service that were not issued" by auction).

[9] If the Commission wishes to police speculators, it can and should do so by applying real-party-in-interest tests or other mechanisms. But utilizing onerous construction requirements in an attempt to accomplish this objective would unfairly punish good-faith applicants and would do little to deter speculation.

build-out requirement must be imposed, it should be a uniform requirement applicable to all 37 and 39 GHz licensees, regardless of the process by which they obtained their licenses.

III. THERE IS NO DEMONSTRATED NEED TO CONSIDER SATELLITE ALLOCATION ISSUES IN THIS PROCEEDING.

Motorola Satellite Communications, Inc. filed a three-page petition in this proceeding pointing out an international (but not domestic) allocation for fixed satellite services in the 37.5-40.5 GHz band. This mere petition, which was accompanied by no technical or demand studies whatsoever, creates no need to delay processing of pending 39 GHz applications because it only seeks an uplink allocation for the fixed satellite service in the 37.5-38.6 GHz band. It also creates no need to delay adoption of any rules for fixed microwave services in the 37.0-37.5 GHz band, an allocation unaffected by the satellite allocation.

The Commission should not adopt any scheme that would permit the 39 GHz band to be "shared" between terrestrial microwave licensees and satellite interests. The 39 GHz band now is licensed to hundreds of terrestrial microwave licensees. There has not even been an attempt by satellite interests to prove that 39 GHz spectrum can be shared among terrestrial and satellite users. Sharing must be presumed to be infeasible until it is proved possible.[10/] Even assuming that there is sufficient demand for additional spectrum for the fixed satellite service in the 37.5-40.0 GHz band, another unproven assertion, the 38.6-40.0 GHz band need not be considered for such uses because satellite interests have sat on any rights they may have had while literally hundreds of terrestrial 39 GHz licenses have been

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[10] The Commission should bear in mind, in this connection, the years of experimental effort that was required before the Commission was able to find that sharing among PCS licensees and incumbent fixed microwave users was feasible. Sharing between downlink satellite services and terrestrial microwave services would present even more complex issues.

issued. The mere potential for some future demand for satellite spectrum should not be allowed to overrun the proven, current need for terrestrial use of 39 GHz spectrum.

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For the reasons set out above, we urge the Commission to quickly vacate its freeze order and structure 37-40 GHz rules in a way that permits all competitors to serve the public expeditiously and effectively.

Respectfully submitted,

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